JAYE W. AND LINDA L. JOHNSON

IBLA 90-526 Decided October 20, 1992

Appeal from that part of a decision of the Montana State Office, Bureau of Land Management, notifying the Johnsons that patent to the land included in reclamation homestead entry MTGF 064341 would reserve the oil and gas deposits to the United States.

Set aside and remanded.

1. Mineral Lands: Mineral Reservation--Reclamation Homesteads

> Where BLM determines, prior to the filing of satisfactory reclamation final proof, that land within a reclamation homestead entry is valuable for oil and gas, the entryman may petition for reclassification of the land as not valuable for oil and gas in accordance with 43 CFR 2093.3(d). If that petition is denied, the entryman is to be offered the opportunity to request a hearing. At such a hearing, the entryman has the burden of showing that the land is not valuable for oil and gas.

APPEARANCES: F. L. Ingraham, Esq., Ronan, Montana, for appellants.

OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

Jaye W. and Linda L. Johnson have appealed from an August 2, 1990, decision of the Montana State Office, Bureau of Land Management (BLM), recognizing the assignment of reclamation homestead entry MTGF 064341 to the Johnsons and informing them that the patent would reserve all the oil and gas deposits in the land to the United States. On appeal, the Johnsons challenge the need for a reservation for oil and gas.

Arthur McGeorge filed reclamation homestead entry Missoula 02764 on November 2, 1910, seeking title to the NE¼ NW¼ (or Farm Unit "C" of the Flathead Project), sec. 24, T. 20 N., R. 21 W., Principal Meridian, Montana, pursuant to the Act of April 23, 1904, 33 Stat. 302, as amended. 1/ In 1913, McGeorge filed satisfactory proof under the ordinary provisions of the homestead law, but he did not file final reclamation proof. He never received title to the land. Under the Act of June 23, 1910, 43 U.S.C.

1/ The entry is also identified in the case record as Great Falls 064341.

§ 441 (1988), however, such entrymen were authorized to assign such entries and "such assignees, upon submitting proof of the reclamation of the lands and upon payment of the charges * * * may receive from the United States
a patent for the lands." 2/ Thereafter, in 1990, the Johnsons filed an assignment of the entry and satisfactory reclamation final proof. In its August 2, 1990, decision, BLM recognized the assignment and informed the Johnsons that patent to the land would include a reservation of all oil
and gas deposits. That decision included the standard appeals paragraph concerning the right to appeal to this Board. However, in a separate letter of the same date, BLM informed the Johnsons that if they wanted to accept the mineral reservation, they could waive their right to appeal and have the patent issue prior to the expiration of the 30-day appeal period. BLM also stated:

> If you disagree with the Bureau's classification of the lands
> as being valuable for oil and gas, you may petition for reclassification of the land as non-mineral in character as to oil and gas,
> and a hearing may be ordered to make this determination. The burden
> of proving the land was known to be mineral in character, prior to filing of reclamation proof, is assumed by the government in accordance with established procedures.

The Johnsons did not execute the waiver. Instead, they filed this appeal. The only grounds set forth for appealing are that "the delay in issuing the patent should not effect the patentee's ownership rights where all things necessary to perfect the reclamation homestead had been accomplished many years ago," and "there has been no physical or substantial evidence of minerals, oil or gas presence on the premises." The appeal
did not state that they were petitioning for reclassification of the land.

The apparent basis for including an oil and gas reservation in the patent is a memorandum, dated November 21, 1986, to the Chief, Lands Adjudication Section, Montana State Office, from the Chief, Mineral Development Section, Montana State Office, stating in its entirety:

> Available information indicates that the subject lands are prospectively valuable for oil and gas, and that the exercise of surface rights, thereon, would not interfere unreasonably with operations under the Mineral Leasing Act.
>
> The burden of proving, prima facie, that this land is known
> to be of mineral character as of November 21, 1986, the date
> of this report, is assumed by the government in accordance with established criteria in 43 CFR 2093.3-3(c).

There is no indication of what the "available information" was that influenced BLM's determination, and no report accompanied the memorandum.

2/ That Act was extended to the Flathead Project by the provisions of the Act of July 17, 1914, 38 Stat. 510.

[1] Under 30 U.S.C. § 123 (1988), where lands within homestead entries are reported to be valuable for oil and gas, those minerals must be reserved to the United States. Avery S. Hopson, A-30332 (June 24, 1965); see 43 CFR 2093.3-4(a). Despite BLM's representation in its November 21, 1986, memorandum, the regulation applicable in this case is 43 CFR 2093.3-3(c)(1), not 43 CFR 2093.3-3(c)(2). The former regulation applies where the Government has made a determination, prior to the submission of final proof, that the lands are valuable for oil and gas; the latter applies where acceptable final proof has been submitted, and the Government thereafter makes such a determination. 3/ 43 CFR 2093.3-3(c)(1) provides:

> Where the Geological Survey reports that land embraced in a nonmineral entry or claim on which final proof has not been submitted or which has not been perfected is in an area in which valuable deposits of oil and gas may occur because of the absence of reliable evidence that the land is affected by geological structure unfavorable to oil and gas accumulation, the entryman or claimant will be notified thereof and allowed a reasonable time to apply for reclassification of the land as nonmineral, submitting a showing therewith, and to apply for a hearing in event reclassification is denied, or to appeal. He must be advised that, if a hearing is ordered, the burden of proof will be upon him, and also that, if he shall fail to take one of the actions indicated, his entry or claim will be impressed with a reservation on oil and gas to the United States. [4/]

In this case, BLM made a determination that the land was valuable for oil and gas in 1986, prior to perfection of the entry. However, the evidence in the case file to support such a conclusion is virtually non-existent. 5/ The record contains no mineral report. In addition,

3/ 43 CFR 2093.3-3(c)(2) states that it applies "[i]n a case where acceptable final proof has been submitted, or a claim perfected, and the Geological Survey thereafter makes a report * * *." See Hulda Boutsen, 90 IBLA 310 (1986).

4/ 43 CFR 2093.3-3(e)(2) provides that where a nonmineral application to enter precedes a classification of land as valuable for minerals, but is unperfected on such date, "the claimant, not then having obtained a vested right in the land, must take patent with a reservation or sustain the burden of showing at a hearing, if one is ordered, that the land is in fact nonmineral in character and therefore erroneously classified * * *." That same regulation distinguishes the situation where the entry is perfected prior to the classification, by stating that in such a case, "the burden will rest upon the Government to show that the land is in fact mineral in character and was so known at the date of final completion and perfection of the claim."

5/ We note appellants included in the documents submitted in support of their request for patent a title insurance commitment that had listed as special exception No. 4:

"Oil and Gas Lease dated June 21, 1980, executed by Jaye W. Johnson

appellants were not notified of the determination and allowed a reasonable time to apply for reclassification, as required by the regulation. On the other hand, appellants' challenge, in their appeal, to BLM's determination is supported by no evidence and, in fact, is undercut by one of their own submissions. See note 5, supra.

Since the case record lacks evidence to support the position of either BLM or appellants, we must set aside BLM's decision to the extent it requires that the oil and gas deposits will be reserved in the patent and remand the case for consideration under 43 CFR 2093.3-3(c)(1). Upon remand, BLM should provide the information to appellants upon which it based its November 21, 1986, determination regarding the value of the land for oil and gas. In accordance with 43 CFR 2093.3-3(c)(1), it should offer appellants the opportunity to petition for reclassification of the lands, as provided for in 43 CFR 2093.3(d). If reclassification is denied, appellants should be offered the opportunity to request a hearing in accordance with 43 CFR 2093.3(d)(2)(ii). 6/ The burden of proof at such a hearing is controlled by 43 CFR 2093.3(e)(2) and, in the circumstances of this case, would be borne by appellants.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Montana State Office is set aside and the case remanded for action consistent with this opinion.

Bruce R. Harris
Deputy Chief Administrative Judge

I concur:

John H. Kelly
Administrative Judge

fn. 5 (continued)
and Linda L. Johnson, his wife, as Lessor, to TransOcean Oil, Inc., as Lessee, for a term of 10 years, and as further therein provided subject to the terms, covenants, conditions and provisions therein contained; * * *.

"LESSEE'S INTEREST ASSIGNED to Mobil Oil Corporation by instrument dated February 11, 1981, * * *."

In 1980, appellants did not have legal title to either the minerals or the surface of the lands in question.

6/ The section states that when a hearing is applied for "the authorized officer will proceed therewith under parts 1840 and 1850 of this chapter." At the time of promulgation of that section, those parts (43 CFR Part 1840 and Part 1850 (1969)) contained the appeals and hearings procedures for the Department that existed prior to the creation of the Office of Hearings and Appeals in 1970. Those parts presently contain cross-references to the hearings and appeals regulations in 43 CFR Part 4.